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Supreme Court, U.S.
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL MARITIME COMMISSION

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58 pp

I

QUESTION PRESENTED

Whether the Eleventh Amendment to the United States Constitution or principles of state sovereign immunity from suit preclude Congress from requiring the Federal Maritime Commission to adjudicate a private person's complaint that a state-run port has violated the Shipping Act of 1984.

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BRIEF FOR THE FEDERAL MARITIME COMMISSION

OPINIONS BELOW

The opinion of the court of appeals is reported at 243 F.3d 165 and is reproduced as Appendix A in the separately-bound appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-25a. The opinion of the Federal Maritime Commission is unofficially reported at 28 Shipping Reg. (P & F) 1385 and is reproduced as Appendix B at Pet. App. 27a-39a. The opinion of the administrative law judge is unofficially reported at 28 Shipping Reg. (P & F) 1307 and is reproduced as Appendix C at Pet. App. 40a-62a.

JURISDICTION

The court of appeals entered its judgment on March 12, 2001. On May 21, 2001, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 10, 2001, and the Commission's petition was filed on that date. The petition was granted on October 15, 2001. 122 S.Ct. 392. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is reproduced in the appendix to this brief. App., *infra*, 1a. Sections 3, 10, 11, 12, 13 and 14 of the Shipping Act of 1984 are also reproduced in relevant part in the appendix to the brief. App., *infra*, 1a-7a.

STATEMENT

Federal regulation of oceanborne transportation in the foreign commerce of the United States is governed by the

Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1701 *et seq.* The Federal Maritime Commission (Commission) is the agency responsible for administering the statute. The Shipping Act regulates several categories of persons, including common carriers of passengers by water in international commerce, as well as persons operating marine terminals - often publicly-operated ports - in connection with common carriers. 46 U.S.C. app. 1702(6) & (14). The Shipping Act forbids certain conduct that Congress has found to be detrimental to competition and efficiency in the shipping industry. 46 U.S.C. app. 1709 (prohibited acts).

A. The adjudication of complaints under the Shipping Act

The Shipping Act includes a procedure by which "any person" may file a complaint with the Commission alleging a statutory violation and seeking monetary reparations and other forms of relief. 46 U.S.C. app. 1710(a). The "person named" in the complaint (the respondent) must either settle the complaint or file a written answer to it with the Commission; unless the respondent settles the complaint, the Commission is required to conduct an adjudication of the merits of the complaint and to issue an appropriate order. 46 U.S.C. app. 1710(b). The Commission is also authorized to initiate investigations of possible violations of the Shipping Act on its own motion. 46 U.S.C. app. 1710(c).

The Shipping Act imposes certain requirements on the Commission's adjudication of a complaint. The Commission must: set a date on or before which its decision will be issued within ten days of the filing of the complaint (46 U.S.C. app. 1710(d)); provide an "opportunity for hearing" before issuing an order on the merits of the complaint (46 U.S.C. app. 1713(a)); and permit the parties to the adjudication to utilize "depositions, written interrogatories, and discovery procedures * * * under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil

proceedings in the district courts of the United States." 46 U.S.C. app. 1711(a)(1).[1] During the adjudication, the Commission may subpoena witnesses and compel the production of documents and other evidence (46 U.S.C. app. 1711(a)(2)); in the event of noncompliance, Commission subpoenas are enforceable by order of a federal district court. 46 U.S.C. app. 1713(c). When the Commission completes its adjudication of a complaint, the Shipping Act requires the agency to issue a written report stating its conclusions, decisions, findings of fact, and order; to provide copies of this report to the parties; and to publish the report for public information. 46 U.S.C. app. 1710(f). If the complaint is timely filed and the complainant proves a violation of the statute and actual injury arising from that violation, the Shipping Act provides that the Commission shall direct the payment of monetary reparations and attorney's fees to the complainant. 46 U.S.C. app. 1710(g). The Commission may also issue prospective relief, such as a cease and desist order. 46 U.S.C. app. 1710(b). All of these statutory requirements, apart from the section governing awards of monetary reparations and attorney's fees, apply equally to the adjudication of a Commission-initiated investigation.

The Commission has enacted procedural regulations to implement the statutory provisions governing its adjudication of complaints and investigations. 46 C.F.R. Part 502, Rules of Practice and Procedure. The Commission assigns proceedings to its administrative law judges (ALJs) in the first instance. 46 C.F.R. 502.146(a). The Commission, upon the request of a party or on its own motion, may review an ALJ's initial decision. 46 C.F.R. 502.227(d). When the Commission reviews an initial decision, it retains complete

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[1] The Hobbs Administrative Orders Judicial Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.*, which governs appellate review of the Commission's orders, sets forth a presumption that the complaint procedure will result in the creation of an administrative record. See 28 U.S.C. 2346.

authority over the matter and is not required to show any deference to the ALJ's opinion. 46 C.F.R. 502.227(a)(6).

The courts of appeals have exclusive jurisdiction to review the merits of Commission orders. 28 U.S.C. 2342. In the event of noncompliance with a Commission order, enforcement may be sought in a federal district court. 46 U.S.C. app. 1713. If the order contains an award of monetary reparations, the party that received the award may initiate the enforcement proceeding; orders granting other forms of relief may be enforced in district court either by the Attorney General at the Commission's request or by a private party. *Ibid.*

B. The complaint filed against the South Carolina State Ports Authority in this case

South Carolina Maritime Services, Inc. (Maritime Services), a South Carolina corporation, filed a complaint with the Commission in which it alleged that the South Carolina State Ports Authority (SCSPA), acting as a marine terminal operator, had violated sections 10(b)(10) and 10(d)(4) of the Shipping Act, 46 U.S.C. app. 1709(b)(10) and (d)(4).[2] JA 7. These sections prohibit marine terminal operators from unreasonably refusing to deal, from conferring any undue or unreasonable preference or advantage, and from imposing any undue or unreasonable prejudice or disadvantage. Maritime Services averred that SCSPA had violated the Shipping Act by refusing to permit Maritime Services' cruise ship, the M/V TROPIC SEA, to berth at SCSPA's facilities in Charleston, South Carolina. *Id.* at 14.

Maritime Services wished to offer passenger cruises from the Port of Charleston, some to "nowhere" and others to the Bahamas. JA 9. Gambling would be available to

[2] The proscription in section 10(b)(10) refers solely to common carriers, but is made applicable to marine terminal operators by section 10(d)(3), 46 U.S.C. app. 1709(d)(3).

passengers while the M/V TROPIC SEA was in international waters. *Ibid.* On five occasions, Maritime Services asked for berthing space and was denied it by SCSPA. *Id.* at 10-12. Maritime Services filed its complaint with the Commission after the fifth request for berthing space was denied.

SCSPA attributed its rejection of Maritime Services' requests to a policy of refusing access to vessels that promote gambling. JA 18-19. In the complaint, however, Maritime Services alleged that SCSPA *had* permitted a competitor, Carnival Cruise Lines, to use SCSPA's facilities at the Port of Charleston on numerous occasions for cruises to "nowhere" on which gambling was available. Maritime Services asserted that SCSPA's uneven application of its stated policy towards gambling vessels was violative of the Shipping Act because it "constitutes an unreasonable refusal to deal or negotiate" and "gives undue and unreasonable preference to cruise lines such as Carnival and imposes an undue and unreasonable prejudice or disadvantage with respect to Maritime Services." *Id.* at 14-15. Maritime Services asked the Commission to award it monetary reparations for actual injuries sustained as a result of the denials of berthing space, as well as interest and attorney's fees. *Id.* at 16. Maritime Services also asked the Commission to seek an injunction in district court against SCSPA, to order SCSPA to cease and desist from violating the Shipping Act, and to award any other just and proper relief. *Ibid.*

Maritime Services' complaint was assigned to an ALJ. SCSPA filed an answer to the complaint, denying that it had violated the Shipping Act; shortly thereafter, it filed a motion to dismiss. JA 18, 27. In the motion, SCSPA asserted that it is an arm of the State of South Carolina and that it enjoys sovereign immunity from private complaints filed with the Commission.[3] *Id.* at 41-44. The motion also raised numerous

[3] In *Ristow v. South Carolina Ports Authority*, 58 F.3d 1051 (4th Cir. 1995), the U.S. Court of Appeals for the Fourth Circuit determined that SCSPA is an arm of the State of South Carolina.

other issues, mostly addressed to a substantive defense of SCSPA's policies as well as Maritime Services' alleged failure to satisfy various federal requirements precedent to the lawful operation of a cruise vessel. *Id.* at 31-41, 44-45. Maritime Services filed a response opposing the motion, in which it argued that "state entities do not enjoy Eleventh Amendment immunity from actions by federal regulatory bodies." *Id.* at 52. The ALJ was not convinced by this argument, and accordingly granted SCSPA's motion. Pet. App. 39a-62a. The ALJ reasoned that the port's immunity from suit extends to proceedings before any forum, including federal administrative agencies, and concluded that this immunity prohibited the Commission from hearing Maritime Services' complaint. *Id.* at 59a-60a. The ALJ did not address the other issues raised in the motion to dismiss.

Reviewing the ALJ's opinion, the Commission reversed and held that the Eleventh Amendment and principles of state immunity from suit do not preclude administrative proceedings initiated by private complaint against state-run marine terminals. Pet. App. 27a-38a. The Commission observed that a sovereign immunity defense is relevant to lawsuits before courts, not to administrative adjudications before federal agencies. *Id.* at 33a. The Commission also noted that its jurisdiction over privately-filed complaints against state-run marine terminals is a crucial tool in fulfilling the agency's obligation to regulate oceanborne transportation in the Nation's foreign commerce. *Ibid.* Although it reversed the ALJ's decision, the Commission did not rule that SCSPA had violated the Shipping Act, did not award reparations to Maritime Services, and did not deny the entirety of SCSPA's motion to dismiss. Rather, the Commission remanded the case to the ALJ for a ruling on the various other issues SCSPA had raised in its motion. *Id.* at 37a-38a.

SCSPA filed a timely petition for review in the United States Court of Appeals for the Fourth Circuit pursuant to

the Hobbs Act.[4] It also filed a motion with the ALJ seeking a stay of the continuing adjudication of Maritime Services' complaint, claiming that it would "suffer irreparable harm if forced to proceed in violation of its constitutional rights." Ct. App. JA 218. The ALJ granted the stay, and the case was held in abeyance pending a resolution of the appeal.

The court of appeals overturned the Commission's order and directed the Commission to dismiss Maritime Services' complaint. Pet. App. 1a-25a. The court concluded that Congress had exceeded its authority when it required the Commission to adjudicate complaints filed by private persons against state-run marine terminals. *Id.* at 25a. Examining the private complaint procedure established in the Shipping Act, the court decided that the Eleventh Amendment and principles of state immunity from suit preclude Congress from "authoriz[ing] private parties to haul unconsenting states before the adjudicative apparatus of federal agencies and commissions." *Ibid.* The court of appeals disagreed with the Commission's argument that the exercise of adjudicatory authority by the agency constitutes executive power not limited by immunity principles, and determined that "any proceeding where a federal officer adjudicates disputes between private parties and unconsenting states" is "invalid * * * whether the forum be a state court, a federal court, or a federal administrative agency." *Id.* at 13a. The court also rejected the Commission's contention that the federal interest in the uniform regulation of maritime commerce demonstrates that sovereign immunity should not apply to proceedings affecting that commerce. *Id.* at 22a-24a.

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[4] The Hobbs Act ordinarily permits appellate review of "final" agency orders. 28 U.S.C. 2342(3). The collateral order doctrine, however, supplies an exception to the finality requirement and allows immediate appellate review of a denial of Eleventh Amendment immunity. See *Seminole Tribe v. Florida*, 517 U.S. 44, 52 (1996).

SUMMARY OF ARGUMENT

In the Shipping Act of 1984 (Shipping Act), Congress has provided for the regulation of oceanborne transportation in the foreign commerce of the United States; the Federal Maritime Commission (Commission) is the agency charged with administering the statute. The Shipping Act regulates marine terminals, which are often publicly-operated ports, and proscribes certain conduct Congress has determined to be harmful to competition and efficiency in the shipping industry. The Act authorizes any person to file a complaint with the Commission alleging a violation of the statute and seeking monetary reparations and other forms of relief, including prospective relief. The question presented is whether the Eleventh Amendment and principles of state sovereign immunity from suit preclude Congress from requiring the Commission to adjudicate a private person's complaint that a state-run marine terminal has violated the Shipping Act.

Because the Eleventh Amendment and sovereign immunity principles confirm the States' immunity from constitutionally inappropriate exercises of *judicial* power, they do not bar the Commission's adjudication of a complaint against a state-run marine terminal. According to the standards set forth in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Commission does not possess the major indicia of judicial power. First, the Commission does not have an exclusively judicial role; rather, it is charged with numerous regulatory responsibilities including but not limited to the adjudication of complaints. Second, the Commission does not hold the authority to punish contempt, and its orders are enforceable only in federal district court. Third, the Commission's orders are reviewed by the courts of appeals under the standards applicable to administrative agency decisionmaking, rather than the standards of review applied to district court rulings. Moreover, the filing of a complaint before the Commission is not a "suit in law or equity," U.S. Const. amend. XI, but

instead is a form of executive enforcement of the law. The Commission's adjudication of complaints is an integral part of its administration of the Shipping Act, and through the adjudicative process the agency creates subordinate policies to effectuate the Act's fundamental policies.

The Court has found that principles of sovereign immunity are constrained by both the Constitution's structure and its historical background. In *Nevada v. Hall*, 440 U.S. 410, 419, 421 (1979), the Court ruled that a State's claim of immunity from suit in the courts of a sister State could not be sustained, because "the need for constitutional protection against that contingency was not discussed" by the Founders, and the Constitution does not "provide any basis, explicit or implicit, for the Court to" find such an immunity. A sovereign immunity defense must be supported by evidence in either constitutional history or constitutional design, and in this case, there is no evidence of state immunity from Executive Branch regulatory authority.

Alden v. Maine, 527 U.S. 706 (1999), does not lead to a contrary conclusion. In *Alden* the Court found that prior to the ratification of the Constitution, the States had enjoyed a traditional immunity from suit in their own courts; the Court determined that the Constitution did not require the States to surrender this immunity. The holding in *Alden* does not, however, establish a free-floating state immunity from any exercise of federal authority; rather, it reflects the Founders' understanding that the States would continue to enjoy their *traditional* immunity from suit in the courts of their own creation. Moreover, the Founders would not have countenanced a claim of state immunity from any aspect of the federal authority to regulate maritime commerce. The authority to ensure national uniformity in the administration of maritime commerce was viewed by the Founders as a fundamental component of the Federal Government's powers.

The result urged by the Commission in this case would not erode the States' immunity. The right to file a complaint

with the Commission is a public right, created by Congress to ensure the efficient administration of the Shipping Act, and adequate judicial review of the Commission's decisions is available in the courts of appeals. The public rights doctrine limits Congress' ability to replace traditional causes of action with agency adjudications, and precludes Congress from vesting in administrative agencies the authority to adjudicate purely private rights. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). By restricting the circumstances under which Congress may authorize administrative agencies to adjudicate complaints, the public rights doctrine protects from erosion both the judicial power in Article III and the States' immunity from that power.

ARGUMENT

Federal regulation of oceanborne transportation in the foreign commerce of the United States is governed by the Shipping Act of 1984 (Shipping Act), 46 U.S.C. app. 1701 *et seq.* The Federal Maritime Commission (Commission) is the agency responsible for administering the statute. Congress provided in the Shipping Act that any person may file a complaint with the Commission alleging violations of the Act, and may seek monetary reparations and other forms of relief. Congress further provided that all marine terminal operators engaged in the business activities regulated by the Shipping Act are subject to its provisions. As explained below, *infra* at 14, the validity of the Shipping Act as applied to state-run marine terminals was resolved in *California v. United States*, 320 U.S. 577 (1944), and is not at issue here, nor is there any suggestion that Congress lacks the authority to regulate state entities. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000). Moreover, the South Carolina State Ports Authority (SCSPA) has conceded (Br. in Opp. 4-5) that the Commission retains the authority to regulate its activities generally. The complaint in this case was properly filed, and Congress clearly expected the Commission to adjudicate it and cases like it.

The question presented is whether the Eleventh Amendment or principles of state sovereign immunity preclude Congress from requiring the Commission to adjudicate a privately-filed complaint against a state-run marine terminal. The courts of appeals have generally found the Eleventh Amendment inapplicable to proceedings before administrative agencies that do not exercise judicial power. See *Premo v. Martin*, 119 F.3d 764 (9th Cir. 1997), cert. denied, 522 U.S. 1147 (1998); *Tennessee Dep't of Human Serv. v. United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992); *Delaware Dep't of Health & Social Serv. v. United States Dep't of Educ.*, 772 F.2d 1123 (3rd Cir. 1985) (in dictum); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981).

In this case, however, the court of appeals ruled that Congress exceeded its authority when it required the Commission to adjudicate privately-filed complaints against state-run marine terminals, and ordered the Commission to dismiss Maritime Services' complaint before the agency could determine whether SCSPA had violated the Shipping Act. The practical effect of the court of appeals' decision is to prevent the Commission from administering the Shipping Act as Congress designed it by forbidding the agency from hearing privately-initiated complaint proceedings against state-run marine terminals, unless they consent to such regulation. In the agency order overturned by the court of appeals, the Commission had noted that its "jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports. Accordingly, the Commission has in the past rebuffed attempts to restrict its jurisdiction over public port authorities." Pet. App. 33a. The court of appeals' decision would prevent the Commission from relying on private complaints as a regulatory tool to ensure that state-run marine terminals comply with the Shipping Act's requirements.

The court of appeals' decision should be reversed. Congress, acting pursuant to its long-recognized power to vest *executive* officers with the capacity to adjudicate complaints, has determined that administrative adjudications are an important component of the regulation of oceanborne transportation in the foreign commerce of the United States. The Eleventh Amendment and principles of sovereign immunity are properly applied to proceedings before tribunals exercising *judicial* power. The constitutional design does not contemplate state sovereign immunity from executive authority, and consequently, there is no basis upon which to find SCSPA immune from the Commission's adjudication of Maritime Services' complaint. Moreover, the historical significance of federal power over the regulation of maritime commerce, and the requirement of uniformity in the regulation of that commerce embedded in the Constitution, confirm that state immunity principles do not apply to proceedings before the Commission. Finally, there is no danger that the States' immunity from suit will be undercut through the use of administrative adjudications, because the public rights doctrine limits Congress' power to vest the adjudication of complaints in non-Article III tribunals. This limitation protects from erosion not only the Article III judicial power itself, but also the States' immunity from that power.

A. STATUTORY BACKGROUND

1. Federal regulation of marine terminals

In order to bring the question presented by this case into proper focus, a brief description of Congress' determination to regulate marine terminals, including state-run marine terminals, is necessary. The Shipping Act of 1916 (1916 Act), 39 Stat. 728, the predecessor to the Shipping Act of 1984, established federal regulation of transportation by water in domestic and foreign commerce. The 1916 Act was designed to strengthen the American shipping industry by granting limited antitrust immunity to price-fixing activities

and by creating a regulatory program that sought to eliminate anticompetitive abuses. See House Comm. on Merchant Marine and Fisheries, Report on Steamship Agreements, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914). Ocean common carriers, conferences of such common carriers, marine terminal operators, and other maritime businesses were included in the 1916 Act's comprehensive regulatory program. 39 Stat. 728.

Marine terminal operators, under the nomenclature "other persons subject to this Act," 39 Stat. 728, were included in this statutory scheme because the 1916 Act's original sponsors believed that effective oversight required regulation not only of vessel operators but also of the port facilities that connected the vessels to the shippers they served. See generally *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Comm'n*, 838 F.2d 536, 542-543 (D.C. Cir. 1988) (discussing Congress' rationale for the regulation of marine terminals under the 1916 Act). Debate in the House of Representatives over the 1916 Act illustrates that Congress intended the Act to apply to both public and private marine terminals, because the regulation of all terminals was seen as crucial to the success of the statutory scheme. Discussing a subsequently defeated amendment that would have removed terminal facilities from the 1916 Act's coverage, several Representatives referred to the publicly-owned ports at New York, Los Angeles, San Francisco, and Seattle, and inquired whether the statute was designed to remove control of those ports from local governments and place it in the Federal Government. 53 Cong. Rec. 8276 (May 18, 1916). In response, Representative Alexander, the 1916 Act's primary sponsor, expressed concern that certain terminals were exercising discrimination in the provision of lighterage charges (*i.e.*, fees for loading and unloading cargo). *Ibid.* He explained that the 1916 Act was drafted to prevent such discrimination, and noted that "not one of [the provisions regulating common carriers] would not have applied to these terminal facilities." *Ibid.*

Representative Alexander acknowledged that some terminals were operated by governments while others were privately operated. He clarified, however, that the 1916 Act would not wrest control of the facilities away from the local governments; rather, it would regulate them in the same manner as private terminals: "[i]f [public marine terminals] do exercise such discrimination, there is no reason why they should not be amenable to the law as well as a private person." *Ibid.*

Relying in part on Representative Alexander's statements, this Court in *California v. United States*, 320 U.S. 577 (1944), confirmed that the "plain purposes" of the 1916 Act required the inclusion of state-run marine terminals within the definition of "other person subject to" the statute.

> The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the [Shipping] Act, and with so large a portion of the nation's dock facilities, as Congress knew (53 Cong.Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies. We need not rest on inference to avoid a construction that would have such dislocating consequences. The manager of the bill which became the Shipping Act of 1916, speaking on the floor of the House, left no doubt that the legislation was designed to prevent discrimination no less by public than by private owners. 53 Cong. Rec. 8276.

320 U.S. at 585-586. The Court also held in a subsequent case that another government entity - the United States in its capacity as a shipper - was a "person" subject to the 1916 Act's provisions. *Far East Conf. v. United States*, 342 U.S. 570 (1952).

2. The origin of the administrative adjudication of complaints in the regulation of oceanborne transportation

Marine terminals, including state-run terminals, were subject to private complaints under the 1916 Act. The complaint procedure in the 1916 Act was based upon section 13 of the Interstate Commerce Act (ICA), 24 Stat. 379, 383-384 (1887), under which "any person" could file a complaint with the Interstate Commerce Commission (ICC) against regulated common carriers, which were required either to settle such complaints or to answer them in writing. The ICC was charged with adjudicating filed complaints, and was required by the statute to issue a written report of its decision. *Id.* at 384. The ICA permitted complainants to seek monetary reparation for statutory violations that caused actual injury, and also authorized the ICC to initiate investigations on its own motion. *Ibid.* Section 9 of the ICA permitted the filing of a lawsuit in federal district court in the first instance alleging violations of the ICA as an alternative to filing a complaint with the ICC. *Id.* at 382.

Congress followed a similar approach to the one it had taken in the ICA when it enacted the 1916 Act, 39 Stat. 728. See *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932) (comparing the ICA and the 1916 Act). Section 22 of the 1916 Act permitted "any person" to file a complaint alleging "any violation of this Act * * * and asking reparation for the injury, if any, caused thereby." 39 Stat. at 736. The respondent was required to settle the complaint or to answer it in writing, and the agency[5] was charged with

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[5] The United States Shipping Board was established by Congress to administer the 1916 Act. 39 Stat. 728, 729 (1916). The Shipping Board was succeeded by the United States Shipping Board Bureau, Exec. Order No. 6166, sec. 12 (1933), which was replaced in 1936 by the United States Maritime Commission. 49 Stat. 1985. The Federal Maritime Board replaced the U.S. Maritime Commission in 1950, Reorg. Plan No. 21 of 1950, 64 Stat. 1273, and the Federal Maritime Commission replaced the Board in 1961, Reorg. Plan No. 7 of 1961, 75 Stat. 840. The Commission is an independent regulatory agency.

adjudicating the merits of the complaint, providing a "full hearing," and issuing a written report of its decision. *Ibid.* Like the ICA, the 1916 Act drew a distinction between adjudications "upon a sworn complaint" and cases "instituted of [the agency's] own motion." *Ibid.* Unlike the ICA, however, the 1916 Act did not authorize the filing of a lawsuit in district court alleging violations of the statute; the agency's jurisdiction over complaints was exclusive. See *United States Navigation Co.*, 284 U.S. at 486 (explaining that the provision in the ICA permitting lawsuits in district court "finds no counterpart in the Shipping Act").

The 1916 Act governed the regulation of transportation in both domestic offshore and foreign commerce. Sixty-eight years after the 1916 Act was enacted, Congress repealed its provisions regarding foreign commerce and replaced them with a new regulatory scheme – the Shipping Act of 1984. Pub. L. 98-237, 98 Stat. 67, 46 U.S.C. app. 1701 *et seq.* See H.R. Rep. No. 98-53, 98th Cong., 1st Sess., pt. 1 at 3 (1983), reprinted in 1984 USCCAN 167, 168. However, the private complaint provisions of the 1916 Act were carried over with little change as section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710. See H.R. Rep. No. 98-53 at 36-37, 1984 USCCAN 167, 201-202. Congress continued to require the regulation of port facilities under the Shipping Act, but dropped the 1916 Act's term "other persons subject to this Act" and replaced it with the clearer designation "marine terminal operator." 46 U.S.C. app. 1702(14) (definition of marine terminal operator). See *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 919 F.2d 799, 801 (1st Cir. 1990) ("The legislative history to the 1984 Act explains that the description of 'marine terminal operator' was taken directly from the 1916 Act's definition of 'other person subject to th[is] chapter'"). The provisions of the Shipping Act have generally been interpreted in a manner consistent with prior interpretations of the 1916 Act. See, *e.g.*, *Plaquemines*, 838 F.2d at 542 ("the intent behind, and prior interpretations of, the 1916 Act's provisions have continuing precedential force" under the Shipping Act of 1984).

B. THE ELEVENTH AMENDMENT AND PRINCIPLES OF STATE SOVEREIGN IMMUNITY FROM SUIT APPLY EXCLUSIVELY TO THE EXERCISE OF JUDICIAL POWER IN A LAWSUIT AGAINST AN UNCONSENTING STATE

The Shipping Act requires the Commission to oversee the application of statutory requirements and prohibitions to state-run marine terminals, and to adjudicate private complaints alleging that such terminals have failed to comply with those requirements and prohibitions. The court of appeals held that Congress exceeded its authority when it enabled private persons to initiate proceedings before the Commission by complaint. However, the inapplicability of the Eleventh Amendment to the Commission's adjudication of a complaint becomes clear when the type of power exercised by the Commission is considered.

The Eleventh Amendment forbids the extension of "[t]he Judicial power of the United States" to "any suit in law or equity" filed against an unconsenting State by a private litigant. Although state immunity from suit is broader than the literal text of the Eleventh Amendment, the seminal cases decided under the Amendment confirm its function as a prohibition against constitutionally inappropriate exercises of *judicial* power. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that the Eleventh Amendment prevents federal courts from hearing suits against unconsenting States by the States' own citizens, although the Amendment speaks only of suits by "Citizens of another State." The Court grounded its ruling on the Founders' views of the proper reach of Article III, and focused in particular upon Alexander Hamilton's explanation in The Federalist No. 81 that the States would enjoy, as one of the "attributes of sovereignty," immunity from suits in federal court to which they did not consent, except when "there is a surrender of this immunity in the plan of the convention." 134 U.S. at 13 (quoting The

Federalist No. 81). The Court understood Hamilton's views to be directed precisely at "the obnoxious clause * * * which declared that 'the judicial power shall extend to all * * * controversies between a State and citizens of another State * * * and between a State and foreign states, citizens or subjects.'" *Ibid.* (quoting U.S. Const., Art. III, sec. 2, cl. 1). Based on this understanding, the Court concluded that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution *when establishing the judicial power of the United States.*" *Id.* at 15 (emphasis supplied). Similarly, the Court in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), determined that the Eleventh Amendment confers immunity from suits in federal court against unconsenting States by foreign states, although the Amendment would on its face only bar suits brought by "Citizens or Subjects of any Foreign State." The Court relied on the principle recognized in *Hans* that the judicial power granted in Article III may not be extended to lawsuits against unconsenting States even when the literal language of the Eleventh Amendment does not bar such suits. *Id.* at 328.

In *Ex Parte New York*, 256 U.S. 490 (1921), the Court held that although the Eleventh Amendment would appear to apply only to "suit[s] in law or equity," the States enjoy sovereign immunity from common law suits in admiralty as well. The case arose under Article III's grant of power to the Federal Judiciary to hear "all Cases of admiralty and maritime Jurisdiction," U.S. Const. Art. III, sec. 2, cl. 1, and was an *in personam* suit against the State of New York. 256 U.S. at 501. Because the Court understood strictures of state sovereign immunity to bar suits against States brought under the authority of the judicial power in Article III, the Court explained that "the entire judicial power granted by the Constitution" does not include the authority to permit a private person to prosecute a suit in admiralty against an unconsenting State. *Id.* at 497. But see *California v. Deep Sea Research, Inc.*, 523 U.S. 491

(1998) (Eleventh Amendment does not bar admiralty suits *in rem*).

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court invalidated Congress' attempt to abrogate the States' sovereign immunity from suit in federal court under a statute passed pursuant to the Indian Commerce Clause. The Court found that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73; see also *id.* at 64 ("[T]he Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment itself is clear enough on this point"). The elemental requirement of an assertion of *judicial* power to the application of the Eleventh Amendment has been recognized in numerous other opinions of this Court. See *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 362 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court"); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that state sovereign immunity principles bar proceedings against States in their own judicial courts); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (the Eleventh Amendment "repudiated the central premise of *Chisholm* [*v. Georgia*] that the jurisdictional heads of Article III superseded the sovereign immunity that the States possessed before entering the Union"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("the judicial authority in Article III is limited by this sovereignty"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III").

The Eleventh Amendment prohibits Congress from enacting a private right of action enforceable by suit against an unconsenting State in federal judicial fora. The language of

the Amendment and the opinions of this Court illustrate that an examination of whether there is state immunity from the exercise of judicial power arises only upon the exercise of that power. On the other hand, there is no evidence that the constitutional design contemplates state sovereign immunity from Executive Branch authority that does not implicate judicial power; all the relevant cases speak in terms of state sovereign immunity's explicit and implicit limits on the judicial power established in Article III. It is therefore necessary to examine whether the Commission exercises judicial power in order to determine whether the Eleventh Amendment can affect its adjudication of complaints.

1. The Federal Maritime Commission does not exercise the judicial power of the United States

This Court has explained that an agency like the Commission is not capable of exercising judicial power. In *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Court addressed whether the Tax Court exercises judicial power and is a court of law under the Constitution's Appointments Clause.[6] Finding that Congress had established the Tax Court as "an Article I legislative court," *Freytag*, 501 U.S. at 888, the Court ruled that "[w]e cannot hold that an Article I court * * * can exercise the judicial power of the United States and yet cannot be one of the 'Courts of Law.'" *Id.* at 889-890.[7] The Court in *Freytag* found

[6] The Appointments Clause provides: "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, sec. 2, cl. 2.

[7] The Court noted that Congress had "enacted legislation in 1969 with the express purpose of 'making the Tax Court an Article I court rather than an executive agency.' S. Rep. No. 91-552, p. 303 (1969)." 501 U.S. at 887. Prior to this enactment, the Court had held that the predecessor Board of Tax Appeals exercised executive power. *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 725 (1929). There is no evidence of congressional intent to establish the Federal Maritime Commission as an "Article I court" exercising judicial power.

that Congress' creation of a tribunal authorized to exercise the judicial power of the United States confers the status of a court of law under the Constitution, and creates in that tribunal the capacity to exercise the appointment power. The Court emphasized the Constitution's restraint on the diffusion of such power, *id.* at 892, and enunciated a test to determine whether a tribunal is vested with judicial power to ensure that any diffusion is properly limited. The test examines a tribunal's "functions to define its constitutional status and its role in the constitutional scheme." *Id.* at 890.

Considering the Tax Court's functions, this Court emphasized its "exclusively judicial role [which] distinguishes it from other non-Article III tribunals that perform multiple functions." *Freytag*, 501 U.S. at 892. An examination of the Commission's myriad functions demonstrates that, unlike the Tax Court, it does not have an exclusively judicial role. The Commission is authorized to carry out its powers through rulemaking as well as adjudication, may launch investigations on its own initiative, and has numerous regulatory responsibilities apart from its obligation to adjudicate complaints. See, *e.g.*, 46 U.S.C. app. 1704-1706 (requiring marine terminals and ocean common carriers to file agreements affecting competition with the Commission; such agreements are exempted from the antitrust laws but are subject to agency scrutiny of anticompetitive effects); 46 U.S.C. app. 1707 (regulating the publication of tariffs and the filing of service contracts); 46 U.S.C. app. 1708 (regulating foreign-government-controlled ocean common carriers); 46 U.S.C. app. 1716 (authorizing the Commission to "prescribe rules and regulations").

Further, the Commission does not share the Tax Court's primary similarity to federal district courts, namely, the authority to punish contempt. See *Freytag*, 501 U.S. at 891 (the Tax Court "has authority to punish contempts by fine or imprisonment"). Compare *International Union v. Bagwell*, 512 U.S. 821, 831 (1994) (power of contempt is a judicial

power "'necessary to the exercise of all others'") (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)). The Commission cannot enforce its subpoenas but must request that the Attorney General seek district court enforcement in the event of noncompliance. 46 U.S.C. app. 1713(c).

Like a district court, the Tax Court has no program interests and no regulatory stake in its jurisdiction over any given case. The Commission, on the other hand, has an interest in the execution and enforcement of its regulatory program, and relies in part on the filing of private complaints to bring Shipping Act violations to its attention. Moreover, the Commission has a great interest in the interpretation of the Shipping Act's provisions, and this interest is advanced through the agency's status as a party in proceedings to review its orders in the courts of appeals. 28 U.S.C. 2348. Courts, of course, are not made parties to appeals of their decisions. The Commission recognized the significant effects SCSPA's claim of immunity might have on the administration of the Shipping Act in its order in this case: "Commission jurisdiction over complaint cases brought against ports is one of the agency's primary means of regulating ports." Pet. App. 33a.

The Tax Court's opinions are examined under the same standard of review that applies to district court rulings. *Freytag*, 501 U.S. at 891. The Commission's orders, however, are reviewed under the standards applicable to an administrative agency's findings and statutory interpretations. See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) (applying substantial evidence standard to the Commission's findings of fact); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and *United States v. Mead*, 533 U.S. 218 (2001) (defining standards of review of an administrative agency's statutory interpretations).

Thus, application of the analysis established in *Freytag* demonstrates that the major indicia of judicial power cannot

be found in the Commission's exercise of its regulatory authority to adjudicate complaints. It is solely the extension of judicial power to a suit against an unconsenting State that the Eleventh Amendment forbids.

2. An administrative adjudication by the Federal Maritime Commission is not a suit in law or equity

Not only is the exercise of judicial power a necessary prerequisite to the analysis of whether a State is immune from a proceeding, but the proceeding must also be a "suit," because the Eleventh Amendment protects unconsenting States from "suit[s] in law or equity," and from suits in admiralty. See *Ex Parte New York*, 256 U.S. 490 (1921); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997) ("The Amendment, in other words, enacts a sovereign immunity from suit"). The filing of a complaint before the Commission does not constitute a "suit," because it is not a judicial proceeding: a suit is "the prosecution of some demand in a court of justice." *Cohens v. Virginia*, 6 Wheat. 264, 407 (1821) (Marshall, C.J.). In this regard, it must be observed that the Eleventh Amendment did not create the States' sovereign immunity, but confirmed its existence. *Alden*, 527 U.S. at 728-729. It is significant that the Amendment specifically uses the word "suit," as opposed to "proceeding" or "cause of action," because it thereby confirms state immunity in terms limited to the meaning of "suit," and that meaning does not extend to the type of adjudication heard by the Commission. For example, in *Upshur County v. Rich*, 135 U.S. 467 (1890), it was determined that a case before an administrative "county court" could not be removed to a federal court because the county court did not exercise judicial power. This Court noted that "a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions * * * is purely administrative in its character, and cannot, in any just sense, be called a suit." *Id.* at 477. The Court's opinion illustrates that the exercise of judicial power is necessary for a proceeding to properly be considered a suit.

While many of this Court's decisions have found that the Eleventh Amendment is not limited by its terms, *supra* at 17, none has ever expressed an intention to expand the scope of sovereign immunity beyond the meaning of the word "suit." The difference between a "suit" as that term is used in the Eleventh Amendment and the Commission's adjudication of a complaint is not merely semantic, but instead reflects the different powers implicated by, and the different objectives of, administrative decisionmaking. Commission adjudication of a privately-filed complaint is a form of executive enforcement of the law, as the Commission noted in its order.

> A private cause of action against an arm of the state brought before an administrative agency, because it invokes the remedial powers of the Executive branch, is in many respects more analogous to a Federal investigation than it is to a suit brought by a private party before a Federal or state court.

Pet. App. 34a. This exercise of executive power serves a different purpose than the employment of judicial power to resolve a lawsuit. Had Congress wanted simply to ensure that private complaints under the Shipping Act are resolved, it presumably would have authorized the filing of a lawsuit in court to vindicate such rights.[8] The Commission, however, is charged with the *administration* of the Act, and with adjudicating complaints under the aegis of a statutorily-mandated concern for safeguarding and regulating transportation in the Nation's oceanborne foreign commerce.

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[8] The Shipping Act does not authorize the filing of a lawsuit alleging violations of the Act. See, *e.g.*, *Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (rejecting a claim of an implied cause of action in court under the 1916 Act); *D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.) (same), cert. denied, 348 U.S. 839 (1954). The Commission's jurisdiction over complaints alleging statutory violations is exclusive.

See 46 U.S.C. app. 1701 (declaration of policy). Thus, the Commission's adjudication of a privately-filed complaint comports with its authority to make subordinate policies in order to execute the broad policies promulgated by Congress with respect to oceanborne transportation. The Commission's interpretations of the Shipping Act shape the continuing development of the standards applicable to the shipping industry by determining, for instance, what constitutes an "unreasonable preference" or an "unreasonable prejudice." 46 U.S.C. app. 1709(d)(4). This is broader than, and different from, the more narrow goal of settling the rights of one party against the rights of another in a lawsuit.

C. PRINCIPLES OF STATE SOVEREIGN IMMUNITY FROM SUIT ARE DEFINED AND CONSTRAINED BY THE CONSTITUTION'S HISTORY AND STRUCTURE

Determination of the scope of the States' sovereign immunity from suit is not a purely functional analysis that examines whether a proceeding is adversarial in nature or whether a State's treasury may be affected. See *Seminole Tribe*, 517 U.S. at 58 ("the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment"). Rather, the Court has recognized that structural and historical limits apply to the States' immunity from suit. In essence, the Court has found that the States are immune from the judicial power granted to the Federal Government in Article III, and from the judicial power exercised in the States' own courts, unless they consent to suit.

1. State sovereign immunity from administrative adjudications cannot be inferred from the history and structure of the Constitution

In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court declined to extend state sovereign immunity from suit to a tort action for monetary damages brought by a citizen of

California against the State of Nevada in a California court. The Court held that neither Article III, establishing the judicial power of the United States, nor the Eleventh Amendment, limiting that power, provide an explicit or implicit constitutional basis upon which to impose restrictions on the authority of state courts to hear lawsuits by private persons against other States. *Id.* at 421. Relying on constitutional history, the Court noted that the ratification debates which addressed the possibility that the States might be sued against their will focused on the scope of the judicial power authorized in Article III. *Id.* at 419. Although the Founders may have assumed that comity would protect a State from being sued in another State's courts, the need for constitutional protection from such suits was not discussed, and the Court found no justification to infer it. *Id.* at 419-421.

The Constitution's establishment of a limited federal judicial power imposes a structural limit on the scope of the States' immunity from judicial authority. For this reason, the Court in *Hall* found that a claim of sovereign immunity lacking foundation in either the Eleventh Amendment or the demarcation of judicial power in Article III "must find its basis elsewhere in the Constitution." 440 U.S. at 421. The Court rejected the State of Nevada's claim that the constitutional structure "implicitly establishes" state immunity from suit in the courts of other States. *Id.* at 424. Similarly, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Court concluded that a Florida court could not apply common law principles of sovereign immunity to bar actions brought under federal law. The Court confirmed in *Howlett* that state sovereign immunity from suit is a doctrine that arises from the Constitution itself, and that a defense asserting such immunity must have a constitutional basis to be upheld. *Id.* at 383.

The decisions in *Hall* and *Howlett* demonstrate that a state sovereign immunity defense must be based upon a constitutional provision, or an implicit constitutional

assumption, to be sustained. It is incontrovertible that the Constitution does not *explicitly* preclude federal regulation through reliance on administrative adjudications initiated by private persons against state entities. Moreover, there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint. Rather, it is clear that the Federal Government may regulate state-run marine terminals, *California v. United States*, 320 U.S. at 586, and there is no "adjudicatory exception" to this exercise of federal authority.

In addition, this Court has recognized that the powers and immunities reserved to the States are those that existed before the adoption of the Constitution. In *McCulloch v. Maryland*, 4 Wheat. 316 (1819) (Marshall, C.J.), the Court found that the power to tax corporations chartered by Congress was not reserved to the States, and that constitutional silence on the matter did not provide evidence of such power. An "original right to tax" federal entities "never existed, and the question whether it has been surrendered, cannot arise." *Id.* at 430. Because the States did not enter the Union with immunity from Executive Branch power exercised in an adjudicatory form, a decision that they are not immune from Commission jurisdiction over privately-filed complaints "does not deprive the States of any resources which they originally possessed." *Id.* at 436. See also *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802-803 (1995).

2. *Alden v. Maine* does not suggest that the States are immune from federal administrative adjudications

The court of appeals relied on this Court's decision in *Alden*, 527 U.S. 706, to reach the conclusion that the Commission's adjudication of a complaint filed against a state-run marine terminal implicates state immunity principles. However, the principles explicated in *Alden*

apply, as a matter of historical origin, only to proceedings before a State's own courts.

In *Alden*, the Court examined whether Congress' explicit abrogation of the States' immunity from suit in their own courts in lawsuits filed by private persons to enforce provisions of the Fair Labor Standards Act was permissible. Based upon the discussion of state immunity from suit in several of the States' ratification conventions, the Court in *Alden* found that "the structure of the original Constitution itself" guaranteed the States' immunity in their own courts. *Id.* at 728. Nevertheless, the issue in *Alden* whether the States retained immunity from suit in their own courts when Congress had specifically sought to abrogate that immunity was a question of first impression. *Id.* at 741. The Court addressed the question by analyzing the "history, practice, precedent, and the structure of the Constitution" to determine whether state immunity from suit in state courts could be abrogated by an Act of Congress. *Ibid.* The Court concluded that the States' immunity from suit in their own courts "was a principle so well established that no one conceived it would be altered by the new Constitution," *ibid*, and that congressional practice and the Court's precedents did not support the existence of a congressional power to abrogate this traditional immunity. *Id.* at 743-748.

The Court in *Alden* thus determined that the States entered the Union with an immunity from suit in their own courts, and that the Constitution did not require them to surrender this immunity. However, a historically-grounded and *traditional* immunity from suit in the States' own courts cannot be the source of the much broader immunity from all adversarial proceedings discovered by the court of appeals in this case. See Pet. App. 24a. There is no evidence that state immunity from the adjudication of complaints by *executive officers* was an established principle at the time of the adoption of the Constitution. No basis for the existence of this principle was cited by the court of appeals. See *id.* at 13a

("To ask the question is to answer it"). Nor is the other primary concern that informed the Court in *Alden* present here: Congress has not attempted to "commandeer the entire political machinery of the State against its will" by requiring a State's courts to hear lawsuits against the State itself. 527 U.S. at 749. In this case, Congress has simply sought to ensure the effective administration of the Shipping Act through the Commission's adjudication of complaints alleging statutory violations.

The decisions in *Hall* and *Howlett*, and the result urged by the Commission in this case, are consistent with *Alden*, in which the Court noted that the scope of state sovereign immunity "is demarcated * * * by fundamental postulates implicit in the constitutional design," 527 U.S. at 729, because there is no proof, historical or structural, that the constitutional design implicitly establishes state immunity from Executive Branch regulatory authority. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The Court in *Alden* noted that in *Hall* it had "determined the Constitution did not reflect an agreement between the States to respect the sovereign immunity of one another." 527 U.S. at 738. In this case, the Constitution does not reflect an understanding that the States would extend their sovereign immunity into the operations of the Executive Branch.

3. The Founders' understanding of the importance of maritime commerce is further evidence that the States do not enjoy sovereign immunity from administrative adjudications before the Federal Maritime Commission

The constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce. Although it is clear that Congress may not vest in the Judicial Branch the authority to hear suits concerning maritime commerce against unconsenting States, *Ex Parte New York*, 256 U.S.

490 (1921), the application of sovereign immunity principles to the regulation of maritime commerce by *executive* officers would be inconsistent with the Founders' concern that such commerce required uniform national treatment.

Because "the contours of sovereign immunity are determined by the Founders' understanding," *Alden*, 527 U.S. at 734, it is necessary to consider how that understanding applies to the case presently before this Court. "Maritime commerce was * * * the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." F. Frankfurter and J. Landis, The Business of the Supreme Court 7 (1927). The failure of the Articles of Confederation to adequately provide for the regulation of commercial relationships between the States was crucial to the process by which the transfer of power to the Federal Government under the Constitution was accomplished. See The Federalist No. 42, at 267 (C. Rossiter ed. 1961) (J. Madison) (describing the failure of the Articles of Confederation to regulate commerce among the States); 3 Records of the Federal Convention, at 334 (M. Farrand ed. 1966) (E. Randolph).

Alexander Hamilton's explanation of the scope of the States' immunity from suit in The Federalist No. 81 has been a primary source in determining the proper reach of the Eleventh Amendment. See, *e.g.*, *Hans*, 134 U.S. at 12-13. Hamilton clarified that "[u]nless therefore, there is a surrender of this [sovereign] immunity in the plan of the convention, it will remain with the States," referring to the States' immunity from the judicial power authorized in Article III. See The Federalist No. 81, at 487-488. However, Hamilton's explanation of the States' immunity from suit must be read in light of his understanding of the essential powers vested in the Federal Government by the "plan of the convention." Accordingly, in The Federalist No. 81, Hamilton referred to The Federalist No. 32, in which he had asserted that the States did not possess sovereignty:

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.

The Federalist No. 32, at 198. The third of these conditions, reflecting the need for national uniformity, applies to the case presently before this Court. See The Federalist No. 22, at 144 (Hamilton) (asserting that the lack of authority over commerce had harmed efforts to gain favorable foreign commercial relations and would "continue to do so as long as the same obstacles to a uniformity of measures continue to exist").

The concerns of the States that were dependent upon the ports of other States for the movement of their imports or exports, as well as the concerns of certain exporting States that the "carrying states" (*i.e.*, States whose citizens were substantially involved in the transportation of goods) would be able to levy protective taxes as a way of excluding foreign competition, were discussed in the ratification debates. For example, in the New York ratifying convention, Hamilton addressed the differences between the "navigating and non-navigating states" and their "dissimilarity of interests and views respecting foreign commerce." 3 Records of the Federal Convention, at 332-333. Similar concerns with respect to federal power over maritime commerce were expressed in other state ratification conventions. See 1 Debates in the State Conventions on the Adoption of the Constitution (J. Elliot ed. 1888), at 186 (J. Iredell); 2 Debates in the State Conventions on the Adoption of the Constitution, at 189 (O. Ellsworth); 3 Debates in the State Conventions on the Adoption of the Constitution, at 312-313 (J. Madison); see also The Federalist No. 42, at 267-268 (J. Madison). The debates illustrate the Founders' concern with protecting the

States from other States' use of their ports for discriminatory purposes, and their determination to grant the Federal Government uniform authority over such matters. The Founders' uneasiness with the States' power to discriminate against one another through their ports found analogous expression in the Constitution's Port Preference Clause, U.S. Const., Art. I, sec. 9, cl. 6, which prohibits the Federal Government itself from "using its commerce power to channel commerce through certain favored ports." *United States v. Lopez*, 514 U.S. 549, 587 (1995) (Thomas, J., concurring).

The concern that the regulation of maritime commerce called for a uniform national power was borne out in the early years of the Federal Government. In *Gibbons v. Ogden*, 9 Wheat. 1 (1824), the Court found that the State of New York's grant of exclusive authority to navigate its waters by certain types of vessels was beyond the State's powers. The Court's understanding of the extent of the federal interest in maritime regulation in *Gibbons* was notable: "if a foreign voyage may commence or terminate at a port within a state, then the power of Congress [to regulate foreign commerce] may be exercised within a state." 9 Wheat. at 195. Similarly, relying on *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299 (1852), the Court recently observed "that there would be instances in which state regulation of maritime commerce is inappropriate even absent the exercise of federal authority," although the Court in *Cooley* had upheld the State of Pennsylvania's regulations in that case as an appropriate exercise of authority over *local* conditions. *United States v. Locke*, 529 U.S. 89, 99 (2000). Against the backdrop of this historical evidence, the Court in *Locke* also noted that maritime commerce is a field in which "the federal interest has been manifest since the beginning of our Republic," and stated that the federal government must be free to regulate vessel navigation "without embarrassment from intervention of the separate States." *Ibid.*

Congressional exercise of its authority to regulate oceanborne transportation in the Nation's foreign commerce through the Shipping Act, whether by the adjudication of complaints or through other means, limits the States' authority to act in a manner inconsistent with that exercise. Yet because the Shipping Act does not wrest control of terminal facilities from state governments, *supra* at 14, it also respects "the established federal-state balance in matters of maritime commerce." *Locke*, 529 U.S. at 106. See also *Plaquemines*, 838 F.2d at 543 (finding that Commission regulation does not remove control from local ports authorities). Application of state sovereign immunity principles to adjudications before the Commission would therefore be inconsistent with the requirement of national uniformity in the regulation of maritime commerce.

Uniformity is more than a theoretical concern for the Commission, and is especially relevant because marine terminals, state-run or otherwise, compete against one another for business. See, *e.g.*, *South Carolina State Ports Auth. v. Georgia Ports Auth.*, FMC Docket No. 84-5, 49 Fed. Reg. 7657 (March 1, 1984); *Port Utilities Comm'n of Charleston, S.C. v. The Carolina Co.*, 1 U.S.S.B. 61 (1925). This Court has recognized that it is critical not to "divide persons 'furnishing wharfage, dock, warehouse, or other terminal facilities' into regulated and unregulated groups." *United States v. American Union Transp., Inc.*, 327 U.S. 437, 443 (1946). To find state-run marine terminals immune from complaint proceedings before the Commission would give them a competitive advantage over other marine terminals, and would consequently "defeat[] the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *California v. United States*, 320 U.S. at 585-586.

D. THE PUBLIC RIGHTS DOCTRINE PROTECTS THE STATES' SOVEREIGN IMMUNITY FROM ENCROACHMENT BY LIMITING THE CIRCUMSTANCES UNDER WHICH CONGRESS MAY AUTHORIZE NON-ARTICLE III TRIBUNALS TO ADJUDICATE COMPLAINTS

In *Thomas v. Union Carbide*, 473 U.S. 568, 583 (1985), the Court observed that Congress may "vest decisionmaking authority in tribunals that lack the attributes of Article III courts." Congress is permitted to authorize the adjudication of certain matters by administrative agencies with limited involvement from the Judicial Branch when the right asserted in the adjudication is a public right. The Court has defined a public right as including "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution." *Id.* at 593-594. The Court has found that, pursuant to the public rights doctrine, Congress may authorize the administrative resolution of disputes between private parties. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) ("we rejected the view that a matter of public rights must at a minimum arise between the government and others") (internal quotation marks omitted) (citing *Northern Pipeline Construction Co v. Marathon Pipeline Co.*, 458 U.S. 50, 69 (1982) (opinion of Brennan, J.)).

The public rights doctrine both allows Congress to authorize the adjudication of complaints in administrative tribunals and limits this authority in order to prevent Congress from avoiding the requirements of Article III. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (Article III forbids "congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts") (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). These limits complement the Eleventh Amendment's confirmation of state sovereign

immunity from federal judicial power. The public rights doctrine, through its protection of Article III from impermissible erosion, ensures that Congress cannot undermine the principles of sovereign immunity that protect the States from the jurisdiction of Article III courts.

1. The right to file a complaint under the Shipping Act is a public right

That the right to file a complaint under the Shipping Act is a public right is confirmed by considering the principles this Court elucidated in *Schor*, 478 U.S. 833. The Court established a three-part test to determine whether a right created by Congress and adjudicated by an administrative agency is a public right. *Id.* at 851. First, the *Schor* test requires the Court to consider the right's source. *Ibid.* Rights arising at common law and some statutory rights that replace common law causes of action are generally presumed to require judicial resolution. *Id.* at 853. Conversely, an agency's adjudication of congressionally-created rights does not offend the domain of Article III. See, *e.g.*, *Thomas*, 473 U.S. at 584 (statute in question did not replace a traditional cause of action).

Under the Shipping Act, both the adjudicatory procedure applicable to complaints and the subject matter of such complaints were created by Congress in the statute and do not reflect preexisting common law rights. The Shipping Act sets forth a list of conduct that is prohibited to participants in maritime commerce, 46 U.S.C. app. 1709, to ensure that principles of competition and efficiency apply to the transportation system in the oceanborne commerce of the United States. See 46 U.S.C. app. 1701 (declaration of policy). In this case, Maritime Services alleged that SCSPA had given an unreasonable preference or imposed an unreasonable disadvantage by supplying berthing space to its competitor, but not to Maritime Services, and had unreasonably refused to deal with Maritime Services.

The statutory proscription in the Shipping Act barring unreasonable preferences is based upon section 3 of the ICA, 24 Stat. 379, 380 (1887), which first prohibited such preferences and prejudices to the common carriers it regulated. Section 16 of the 1916 Act, using virtually identical language, applied the proscription to "other persons subject to th[e] act," including marine terminals. 39 Stat. 728, 734. This language was carried over, with little change, as sections 10(b)(11) and (12) of the Shipping Act of 1984, 98 Stat. 67, 78 (1984), former 46 U.S.C. app. 1709(b)(11) and (12), applicable to marine terminal operators by section 10(d)(3), 98 Stat. 67, 80 (1984), former 46 U.S.C. app. 1709(d)(3). The prohibition is presently located at 46 U.S.C. app. 1709(d)(4), pursuant to the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902.

The other statutory prohibition advanced by Maritime Services in its complaint, that SCSPA had unreasonably refused to deal, was also established by Congress in the Shipping Act, initially as sections 10(b)(12) and (13), former 46 U.S.C. app. 1709(b)(12) & (13), and presently as section 10(b)(10), 46 U.S.C. app. 1709(b)(10), 112 Stat.1902, 1910. Maritime Services' right to file a complaint in this case alleging that SCSPA had given an unreasonable preference or imposed an unreasonable disadvantage, or unreasonably refused to deal, thus originates from an Act of Congress and does not reflect a preexisting common law right - there are no common law provisions against undue preferences in oceanborne transportation.

The second step in the *Schor* test is to examine the interests that convinced Congress to vest in the Commission the authority to hear complaints. 478 U.S. at 855. In *Schor*, the Court explained Congress' determination to establish the Commodity Futures Trading Commission as an adjudicative body: the need to create a forum for the adjudication of complaints, the importance of vesting such adjudication in an expert regulatory agency, and the significance of the agency's role in ensuring the effectiveness of the regulatory scheme. *Id.* at 855-856.

This analysis applies equally to the Federal Maritime Commission. The Shipping Act is a particularized area of law, and it is well-established that the agency is "the expert body established by Congress for safeguarding this specialized aspect of the national interest." *California v. United States*, 320 U.S. at 584 (referring to the U.S. Maritime Commission, predecessor to the Federal Maritime Commission). Moreover, the objectives of the Shipping Act are hindered by noncompliance, and the agency does not have adequate resources to investigate on its own motion all possible statutory violations: at the time of the writing of this brief, the Commission employs a total of eight investigators to pursue violations of the Act. It is therefore necessary for private persons operating in maritime commerce to file complaints in order to ensure that Shipping Act rights are enforced and vindicated, and the adjudication of privately-initiated complaints is an efficient substitute for agency-initiated investigations of prohibited conduct. As explained above, Congress has specifically found that it was crucial to the success of the regulatory scheme that both public and private marine terminals be regulated by the Act. See *supra* at 12; see also *California v. United States*, 320 U.S. at 586. Moreover, the application of principles of common carriage to marine terminals operating in United States foreign commerce undeniably implicates the public interest. "The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest." *American Export-Isbrandtsen Line, Inc. v. Federal Maritime Comm'n*, 444 F.2d 824 (D.C. Cir. 1970). See also *Munn v. Illinois*, 94 U.S. 113, 133 (1876) (recognizing that there are "businesses in which the whole public has a direct and positive interest"). Congress enhanced administrative effectiveness and efficiency in a field of great public interest when it vested in the Commission the authority to adjudicate privately-filed complaints. Compare *Schor*, 478 U.S. at 856 (Congress' objective was "to ensure the effectiveness of [the regulatory] scheme").

The third step in the *Schor* analysis is to examine whether the statutory design secures adequate participation by the Judicial Branch without encroaching on its prerogatives. 478 U.S. at 854. Congress has achieved this goal by providing for review of the Commission's orders in the courts of appeals, which have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the agency's decisions in its adjudication of complaints. 28 U.S.C. 2342. This Court has held that public rights are susceptible of extremely limited judicial review, and the appellate review applicable to the Shipping Act is therefore more than sufficient to meet this standard. See *Thomas*, 473 U.S. at 592 (upholding statutory scheme that allowed judicial review of agency adjudication only in cases of fraud). Moreover, the enforcement of Commission orders can only be imposed by a federal district court. See 46 U.S.C. app. 1713(c) (subpoenas); 46 U.S.C. app. 1712(e) (civil penalties). Finally, because the Commission is responsible for administering a "particularized area of law," it does not intrude upon the terrain of Article III. *Northern Pipeline*, 458 U.S. at 85 (opinion of Brennan, J.).

2. The public rights doctrine would not permit Congress to undermine the States' traditional immunity from suit

Pursuant to the application of the analysis in *Schor*, the right to file a complaint under the Shipping Act is a public right. Congress may vest in an administrative agency like the Commission the power to adjudicate a public right only when there is a valid and specific need to do so, and only with respect to a subject matter that does not require judicial resolution. See *Schor*, 478 U.S. at 853-854. The public rights doctrine thereby operates as a constitutional limitation on congressional power to place the adjudication of disputes outside of Article III, and principles of state sovereign immunity from suit operate as "a constitutional limitation on the federal judicial power established in Art. III."

Pennhurst, 465 U.S. at 98. Because these limitations are complementary, the States' sovereign immunity is neither implicated by, nor threatened with erosion from, the adjudication by the Commission of a matter involving public rights in a complaint against a state-run marine terminal. Compare *Granfinanciera*, 492 U.S. at 53 ("the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal"). The States are immune under the Eleventh Amendment from suits which must be heard in constitutional courts, but the States are not immune from regulation when that regulation takes a constitutionally permissible adjudicatory form.

The court of appeals in this case was concerned that Congress had attempted an "end-run around the Constitution" by vesting in the Commission the capacity to hear complaints that might be barred by the Eleventh Amendment if they were heard in a district court. Pet. App. 12a-13a. There is no indication, however, that Congress established the regulation of marine terminals through the administrative adjudication of privately-filed complaints as a means of circumventing the Eleventh Amendment. Moreover, this Court has already clarified that Congress is not permitted to authorize administrative agency adjudications simply to avoid the restraints inherent in Article III. In *Schor*, the Court warned that Congress could not permissibly create "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article II supervision or control and without evidence of valid and specific legislative necessities." 478 U.S. at 855. As one commentator has noted, under this Court's jurisprudence "[w]holesale transfers of jurisdiction, whose sole purpose is to destroy the protection of Article III, are plainly invalid." Paul Bator, The Constitution as

Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L. J. 233, 258 (1989).

Furthermore, this Court has held, with respect to traditional causes of action, that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855). See also *Granfinanciera*, 492 U.S. at 54-55 ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact * * * it must be adjudicated by an Article III court"); *Thomas*, 473 U.S. at 584 ("Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review"); *Crowell v. Benson*, 285 U.S. 22 (1932). There is no private cause of action in court alleging a violation of the Shipping Act and seeking monetary reparations, *supra* at 24 n.8, and Congress did not replace traditional common law rights when it established the Shipping Act, but instead created new statutory rights.

Finally, the Court has held that public rights are susceptible of judicial determination but do not require it, because "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas*, 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68 (opinion of Brennan, J.)). The Eleventh Amendment and principles of state sovereign immunity from suit should not apply to a regulatory scheme in which Congress has chosen to render more efficient the investigation and resolution of possible statutory violations by permitting private parties to file complaints. Because the

adjudication by the Commission of a matter involving a public right does not require judicial resolution, the Constitution should not require that the States be immune from its administrative resolution.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Eleventh Amendment to the United States Constitution provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Section 3(14) of the Shipping Act of 1984, 46 U.S.C. app. 1702(14), provides as follows:

> (14) "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

3. Section 10(b)(10) of the Shipping Act of 1984, 46 U.S.C. app. 1709(b)(10), provides as follows:

> **(b) Common carriers**
>
> No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * *
>
> (10) unreasonably refuse to deal or negotiate.

4. Sections 10(d)(3) and 10(d)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1709(d)(3) and (d)(4), provide as follows:

> (3) The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators.
>
> (4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue

or unreasonable prejudice or disadvantage with respect to any person.

5. Section 11 of the Shipping Act of 1984, 46 U.S.C. app. 1710, provides as follows:

1710. Complaints, investigations, reports, and reparations.

(a) Filing of complaints

Any person may file with the Commission a sworn complaint alleging a violation of this chapter, other than section 1705(g) of this Title, and may seek reparation for any injury caused to the complainant by that violation.

(b) Satisfaction or investigation of complaints

The Commission shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the Commission, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

(c) Commission investigations

The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this chapter. Except in the case of an injunction granted under subsection (h) of this section, each agreement under investigation under this section remains in effect until the Commission issues an order under this subsection. The Commission may by order disapprove, cancel, or modify any agreement filed under section 1704(a) of this Title that operates in violation of this chapter. With respect to agreements inconsistent with section 1705(g) of this Title, the Commission's sole remedy is under section 1705(h) of this Title.

(d) Conduct of investigation

Within 10 days after the initiation of a proceeding under this section, the Commission shall set a date on or before which its final decision will be issued. This date may be extended for good cause by order of the Commission.

(e) Undue delays

If, within the time period specified in subsection (d) of this section, the Commission determines that it is unable to issue a final decision because of undue delays caused by a party to the proceedings, the Commission may impose sanctions, including entering a decision adverse to the delaying party.

(f) Reports

The Commission shall make a written report of every investigation made under this chapter in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties. The Commission shall publish each report for public information, and the published report shall be competent evidence in all courts of the United States.

(g) Reparations

For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this chapter plus reasonable attorney's fees. Upon a showing that the injury was caused by activity that is prohibited by section 1709(b)(3) or (6) of this Title or section 1709(c)(1) or (3) of this Title, or that violates section 1709(a)(2) or (3) of this Title, the Commission may direct the payment of additional amounts; but the total

recovery of a complainant may not exceed twice the amount of the actual injury. In the case of injury caused by an activity that is prohibited by section 1709(b)(4)(A) or (B) of this Title, the amount of the injury shall be the difference between the rate paid by the injured shipper and the most favorable rate paid by another shipper.

(h) Injunction

(1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.

(2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.

6. Section 12 of the Shipping Act of 1984, 46 U.S.C. app. 1711, provides as follows:

1711. Subpoenas and discovery.

(a) In general

In investigations and adjudicatory proceedings under this chapter—

(1) depositions, written interrogatories, and discovery procedures may be utilized by any party under rules and regulations issued by the Commission that, to the extent practicable, shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States; and

(2) the Commission may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence.

(b) Witness fees

Witnesses shall, unless otherwise prohibited by law, be entitled to the same fees and mileage as in the courts of the United States.

7. Section 13(e) of the Shipping Act of 1984, 46 U.S.C. app. 1712(e), provides as follows:

(e) Failure to pay assessment

If a person fails to pay an assessment of a civil penalty after it has become final or after the appropriate court has entered final judgment in favor of the Commission, the Attorney General at the request of the Commission may seek to recover the amount assessed in an appropriate district court of the United States. In such an action, the court shall enforce the Commission's order unless it finds that the order was not regularly made or duly issued.

8. Section 14 of the Shipping Act of 1984, 46 U.S.C. app. 1713, provides as follows:

1713. Commission orders.

(a) In general

Orders of the Commission relating to a violation of this chapter or a regulation issued thereunder shall be made, upon sworn complaint or on its own motion, only after opportunity for hearing. Each order of the Commission shall continue in force for the period of time specified in the order or until suspended, modified, or set aside by the Commission or a court of competent jurisdiction.

(b) Reversal or suspension of orders

The Commission may reverse, suspend, or modify any order made by it, and upon application of any party to a proceeding may grant a rehearing of the same or any matter determined therein. No rehearing may, except by special order of the Commission, operate as a stay of that order.

(c) Enforcement of nonreparation orders

In case of violation of an order of the Commission, or for failure to comply with a Commission subpoena, the Attorney General, at the request of the Commission, or any party injured by the violation, may seek enforcement by a United States district court having jurisdiction over the parties. If, after hearing, the court determines that the order was properly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

(d) Enforcement of reparation orders

(1) In case of violation of an order of the Commission for the payment of reparation, the person to whom the

award was made may seek enforcement of the order in a United States district court having jurisdiction of the parties.

(2) In a United States district court the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs, nor for the costs of any subsequent stage of the proceedings, unless they accrue upon his appeal. A petitioner in a United States district court who prevails shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.

(3) All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties in the order may be joined as defendants, in a single suit in a district in which any one plaintiff could maintain a suit against any one defendant. Service of process against a defendant not found in that district may be made in a district in which is located any office of, or point of call on a regular route operated by, that defendant. Judgment may be entered in favor of any plaintiff against the defendant liable to that plaintiff.

(e) Statute of limitations

An action seeking enforcement of a Commission order must be filed within 3 years after the date of the violation of the order.